

Note: The comments below are intended for insertion within the draft resolution accompanying this draft ordinance

Introduction

"Development along rivers and streams that destroys protective riparian areas is possibly the single most urgent ecosystem threat facing Montana today. Not only do these waterways and riparian areas provide fish and wildlife habitat, they also provide jobs and recreation." (Governor Brian Schweitzer, Letter to Directors of the Montana DEQ, DNRC and FWP 3-8-06)

Steering Committee Guiding Statement

Based on input received at numerous public meetings, the steering committee recommends the following:

The proposed Streamside Protection Ordinance should focus primarily on the importance of preserving riparian habitat and water quality in order to minimize the cumulative effects of stream degradation associated with streamside development. For the proposed planning area, flood control, channel migration and viewshed protection are considered secondary concerns within the context of current growth patterns. Out of respect for private property rights, and in recognition of existing regulatory programs, these secondary concerns should be relegated to future planning efforts. As conditions change regulatory controls can, and should, be expanded accordingly.

Note: Some sections of the ordinance and related exhibits are still being researched and developed. Those areas are noted within the document. In cases where the steering committee's view on certain item was unclear, an effort was made to suggest options for further consideration. These options are shown in bold.

Ordinance No. _____

STREAMSIDE PROTECTION STANDARDS
AND PERMITTING PROCESS FOR MADISON COUNTY WATERWAYS EAST
OF THE TOBACCO ROOT AND GRAVELLY MOUNTAINS, EXCLUDING THE
SOUTH BOULDER RIVER DRAINAGE

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Section 1. Purpose

This ordinance is intended to protect the riparian resources and water quality of Madison County waterways east of the Tobacco Root and Gravelly Mountains, excluding the South Boulder River drainage, and maintain property rights and values. Standardized, science-based setback restrictions on new buildings within the planning area are used to balance these public and private interests.

Section 2. Authority

The general authority of the Board of Madison County Commissioners and their ability to make and enforce rules are broadly described in 7-5-2101 and 2102, MCA.

The Madison Valley Growth Management Action Plan, adopted on May 30, 2007, in support of the guiding principles identified in the Madison County Growth Policy, specifically recommends the “use of building setbacks to protect rivers and streams” including “land not subject to subdivision review.”

Section 3. Definitions (include sources and references)

Note: Some of the definitions are still being researched

For the purposes of this Ordinance, the following definitions shall apply:

Administrative Variance

Bank:

Board of Madison County Commissioners: (hereinafter referred to as “the Board of Commissioners”).

Buffer Area or Zone: An area of land intended to separate potentially incompatible uses.

Building: A structure having a roof supported by walls or columns or other supports, intended for the shelter or enclosure of person, animals, or moveable property.

Critical aquatic habitat:

Critical terrestrial habitat:

County Planning Office:

Ephemeral Stream: a drainageway that flows only in response to precipitation in the immediate watershed or in response to the melting of snow or ice and is always above the local water table.

Floodplain: an area adjoining a stream that would be covered by floodwater of a 100-year (base) flood.

Intermittent Stream: a stream or reach of a stream that is below the water table for at least some part of the year and that obtains its flow from both ground water discharge and surface runoff.

Madison River: that portion of the Madison River, its main stem and all braids and side channels with established floodplains. This Ordinance applies to property within the jurisdiction of Madison County only.

Madison River Watershed: a north-flowing, naturally drained area that supplies water to the Madison River with boundaries defined by the Madison Mountain Range on the east, the Gravelly Range and south end of the Tobacco Root Mountains on the west, the Continental Divide to the south and the Missouri River to the north. This Ordinance applies to property within the jurisdiction of Madison County only.

Management Plan:

Ordinary High Water Mark: the line that water impresses on land by covering it for sufficient periods to cause physical characteristics that distinguish the area below the line from the area above it. Characteristics of the area below the line include, when appropriate, but are not limited to, deprivation of the soil of substantially all terrestrial vegetation and destruction of its agricultural vegetative value. A floodplain adjacent to surface waters is not considered to lie within the surface waters' high-water marks (23-2-301, MCA)

Pre-existing Building: a structure **(building)** located **(or permitted by other county regulations)** within the setback area before the adoption date of this ordinance.

Perennial Stream: a stream that historically has flowed continuously during all seasons of the year, during dry as well as wet years.

Procedural Variance:

Riparian Area: The banks and adjacent areas of water bodies, watercourses, seeps and springs whose waters provide a more moist habitat than that of adjacent uplands. Riparian areas integrate the interactions of virtually all the physical, vegetative, and biologic components of a watershed. Riparian areas have: (1) distinctively different vegetative species than adjacent areas; and/or (2) species similar to adjacent areas but exhibiting more vigorous or robust growth forms. They are considered transitional areas between aquatic and upland habitats. Riparian vegetation is associated with the natural presence of surface waters, rather than manmade practices such as irrigation.

Riverbank Stability Area: That area from the top of the stream banks to the water's edge covered by all types of vegetation that reduces erosion and floodwater velocity, while supporting bank shear strength and stream channel morphology.

Secondary Buffer Zone:

Setback: The minimum distance that a building may be located from a river, creek or protected area. Setbacks are measured horizontally from the ordinary high water mark, where evident, of rivers or creeks, or from the established bank of the waterway.

South Boulder River drainage:

Stream: a natural watercourse of perceptible extent that has a generally sandy or rocky bottom or definite bank that confines and conducts continuously or intermittently flowing water.

Streamside Protection Permit (hereinafter referred to as “the permit”): a permit establishing a building setback from a regulated stream, issued per this ordinance,.

Streamside Protection Permit Review Board (hereinafter referred to as “the Review Board”): the Madison Country Planning Board.

Structure: Anything constructed or erected.

Upland Habitat: a dry bluff with steep streamside slopes terminating in a defined cliff or bench.

Variance: see administrative or procedural variance

Vegetative Buffer Zone:

Watershed: A geographic area in which water, sediments, and dissolved materials drain to a common outlet – a point on a larger stream, a lake, an underlying aquifer, an estuary, or an ocean. The area is also called the drainage basin of the receiving water body.

Waterway: a watercourse in which water flows either continuously or intermittently and has a definite channel, bed, or bank.

Section 4. Jurisdictional Area

As shown in Exhibit A, this Ordinance shall apply to all property within Madison County within 150 feet of a regulated stream, east of the Tobacco Root and Gravelly Mountains, and excluding property located within incorporated towns or the South Boulder River drainage. The 150 foot measurement is not a building setback, but serves to define an area requiring compliance review prior to constructing new buildings, or altering existing buildings. Building activity, more than 150 feet from the ordinary highway mark or bank of a regulated stream, is not regulated by this ordinance. In the event of uncertainty, the property owner is encouraged to contact the County Planning Office. A list of the regulated streams is included in Exhibit B.

Section 5. Compliance

Setbacks pertain to all building activity within the jurisdictional area, described in Section 4. Jurisdictional Area, unless specifically allowed by the exceptions described in Section 11. ExceptionsNo building shall be located, extended, or structurally altered without full compliance with the terms of this ordinance.

Section 6. General Standards

All building activity within the jurisdictional area will be reviewed by the County Planning Office for compliance with the following criteria:

- A. Setbacks established through the subdivision process.
- B. A fixed-width vegetative buffer zone with a minimum building setback of:
 - 1. 50 feet from the ordinary highway mark of the Madison River,
 - 2. 50 feet from the ordinary high water mark of the Jefferson River, and
 - 3. 25 feet from the bank of all other regulated waterways.

The vegetative buffer zone is intended to be an undisturbed area, defined by native riparian vegetation, where maintenance of native habitat is required. The primary functions of the buffer zone are to provide a continuous corridor of natural aquatic and terrestrial riparian habitat and to serve as a sediment and chemical filter to maintain water quality.

Prohibited activities within the vegetative buffer zone include:

- 1. All building activity, unless specifically allowed under Section 11. Exceptions, or by Section 10. Variance Process.
- 2. Removal of native vegetation beyond reasonable efforts to minimize hazardous fuel levels and control the spread of noxious weeds.
- 3. Introduction of non-native plant species. (In the absence of native vegetation due to site conditions associated with prior land use activities, reestablishment of native vegetation is expected. Refer to Exhibit C for examples of dominant riparian vegetation types)

Note: Additional building restrictions for committee consideration

- 4. Grading or excavation activities, beyond those performed for safety reasons, for example, to stabilize an eroded hillside**
 - 5. Road construction activities, unless the road is for purposes of crossing or gaining limited access to a regulated stream.**
- C. A variable-width, building setback zone. A building setback in addition to the buffer zone may be required to mitigate site-specific impacts to the following resources and/or conditions: :
 - 1. Critical aquatic or terrestrial riparian systems or habitat as defined in Exhibit C
 - 2. Steep slopes, greater than 25% grade.
 - 3. Unstable soil types, as defined by USGS Soil Survey Data

The secondary setback zone is intended to provide additional protection where unique environmental conditions relating to riparian habitat and water quality are readily apparent on the property. The width of this variable building setback will be negotiated with the property owner to achieve “no net loss” of significant riparian habitat or water quality while also respecting the property owner’s right to build on the property. In many situations the vegetative buffer zone will provide adequate resource protection, thereby negating the need for a secondary setback zone.

Prohibited activities within the secondary setback zone are the same as those identified for the vegetative buffer zone (Section 6, B, 1-3)

- D. Compliance with state and local sanitation requirements and water quality standards (Title 7, Chapter 13; Title 75, Chapters 5 and 6; Title 76, Chapter 4, MCA);
- E. Compliance with local, state, and federal floodplain regulations and other applicable Ordinances.

Section 7. Permitting Process

Prior to initiating any building construction or alteration activity within the jurisdictional area of this ordinance, the property owner must apply for a Streamside Protection Setback Permit from the County Planning Office. Refer to Appendix A - Setback Permit Application for additional information. Applications shall be submitted, reviewed, and acted upon as follows:

- A. The permit application shall be submitted to the County Planning Office. A permit review fee, if any, shall be established by ordinance adopted by the Board of Madison County Commissioners.
- B. The County Planning Director will review the application for compliance with this ordinance.
- C. The Planning Director may consult with pertinent county, state, and federal agencies during permit review, including the County Sanitarian, County Floodplain Administrator, local Conservation District Manager, Montana Department of Environmental Quality (DEQ), and/or Montana Department of Fish, Wildlife, and Parks (FWP).
- D. The applicant shall allow county, state, and federal representatives to visit the site as a part of their review to determine the presence of environmentally significant resources or conditions.
- E. The Planning Director may determine that an independent professional engineering or environmental analysis is needed. When such analysis is required, the applicant/property owner shall be required to pay all

- independent professional fees. Application review shall be suspended until the independent findings are submitted and accepted by the Planning Director.
- F. Within 20 working days of receipt of a complete application as described in Appendix A, including agency comments and independent findings, if required, the Director shall approve, conditionally approve, or deny the permit.
1. If approved, a permit shall be issued within five (5) working days and mailed, with the written notice of approval, to the applicant at the address given on the application.
 2. If denied, within five (5) working days a written notice of the denial with an explanation of the basis for the denial shall be mailed to the applicant at the address given on the application.
 3. If conditionally approved, within five (5) working days a written notice detailing the conditions of approval shall be mailed to the applicant at the address given on the application. Within 30 days, the applicant must submit to the Planning Director a detailed management plan, addressing all conditions of approval, in accordance with Exhibit D, Management Plan Requirements. The Planning Director shall have five (5) working days to review the Plan for completeness, prior to the County's issuance of the permit.
- G. In the event of a decision to deny or conditionally approve the permit, the applicant may appeal this administrative decision according to Section 9, or request an administrative or procedural variance from the ordinance according to Section 10.
- H. The permit is valid for three years from the date of approval. Once the terms of the permit have been satisfied, the applicant must contact the County Planning Office to schedule a compliance site inspection.
- I. The applicant may request a one year extension to the permit.

Section 8. Special Conditions

Recognizing the difficulty of applying one set of specific standards to diverse and dynamic riparian systems, the following special conditions have been identified as guidelines for compliance and variance considerations.

A. Decreases in Setback

1. Fixed vegetative buffer zone with will not be reduced unless necessary to accommodate the only practical building site on a property. Examples of such situations include a lot of limited depth, a flat bench in close proximity to a regulated stream on an otherwise steep-sloped lot, or

similar circumstances. An administrative variance, supported by a management plan, may be issued by per Section 10.

2. Variable secondary setback width may be reduced:
 - a. If, elevation changes between the waterway and the land to be developed are substantial, resulting in a separate upland habitat. In those cases where the riparian corridor is distinctly defined by topography, an administrative variance, supported by a management plan that avoids disturbance to the exposed slope and maintains a minimum 25 foot buffer zone between a building, its deck or extensions, and the edge of a cliff or bench, may be issued per Section 10.
 - b. In support of an innovative building proposal or in exchange for concessions from a property owner that furthers the intent of this ordinance. For example, unique environmental conditions associated with a building site may allow for an overall net gain in resource protection by relaxing setback restrictions in one area of the property. A procedural variance, supported by a management plan, may be issued per Section 10.

B. Increases in Setback

1. Prevailing county, state, and federal public health and safety regulations associated with subdivision review, sanitation, water quality, and flood control and channel migration take precedent over this ordinance, and may necessitate a wider building setback than required by this ordinance.
2. Lots which have a setback established through the subdivision process shall take precedence over the setbacks in this ordinance.
3. In the event of compelling environmental benefit, the following incentives are offered in exchange for a voluntary agreement from a property owner to increase a building setback beyond those required by the ordinance.

Note: Incentive options are still being researched.

Section 9 Appeal Process

A. The following aggrieved parties may appeal a permit decision:

1. The property owner requesting a permit.
2. A property owner with a property boundary contiguous to the tract containing the proposed building site.
3. For the purposes of this section, “aggrieved” means a person, or party who can demonstrate a specific personal and legal interest, as

distinguished from a general interest, who has been or is likely to be specially and injuriously affected by the decision.

B. Appeals of Administrative Decision

1. Administrative decision appeals shall be reviewed by the Streamside Protection Permit Review Board. An appeal review fee, if any, shall be established by ordinance adopted by the Board of Madison County Commissioners.
2. Those aggrieved by a County Planning Director's administrative decision may submit a written appeal specifying the grounds thereof and the remedy sought to the Review Board. Appeals must be filed within thirty (30) days of the date of the administrative decision.
3. Upon receipt of a written appeal, the Planning Director will schedule and post a public hearing with the Review Board for the earliest possible date. A legal notice of the hearing will be placed in the newspaper of general circulation in the county. Said notice must appear not less than 15 days prior to the public hearing and run two consecutive weeks.
4. At the public hearing, the Review Board will accept testimony from persons interested in the appeal, the appellant and/or their attorney, and the Planning Director.
5. Following testimony and Review Board discussion, the Review Board will issue an advisory recommendation of approval, conditional approval, or denial of the appeal.
6. Written notice of the Review Board's recommendation and the basis for the decision shall be forwarded to the Board of Madison County Commissioners within ten (10) days and a copy mailed to the applicant by the county planning staff.
7. Upon receipt of the written recommendation, the Board of Commissioners will schedule and post a public meeting for the earliest possible date to act on the appeal.
8. Following review and discussion of the recommendation the Board of Madison County Commissioners will by motion vote to approve, conditionally approve, or deny the appeal.
9. Written notice of the decision shall be mailed to the applicant by the county planning staff. If the appeal is denied, or conditionally approved, the notice shall include an explanation of the basis for the denial, or conditions.

C. Appeals to District Court.

Those aggrieved by a decision of the Board of Madison County Commissioners may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within

thirty (30) days of the date the written notification of the decision, made by the Board of Commissioners at a public meeting, is mailed to the appellant.

Section 10. Variance Process

A. Administrative Variance (Minor Deviation Review)

Upon request of the applicant, the Planning Director will consider an administrative variance to the ordinance in support of the Special Conditions described in Section 8. A variance review fee, if any, shall be established by ordinance adopted by the Board of Madison County Commissioners. The request shall include a complete application, management plan as described in Exhibit D and a narrative addressing the three review criteria established by the Montana Supreme Court for the granting of variances:

1. The variance would not be contrary to public interest.
2. Literal enforcement of the ordinance would result in an unnecessary hardship owing to conditions unique to the property.
3. The spirit of the ordinance would be observed and substantial justice done.

The Planning Director will make a decision within five (5) working days approving, denying or approving with conditions the variance request. Written notice of the decision including the basis for the decision shall be mailed to the applicant. In the event of approval with conditions, the applicant must submit an updated management plan addressing all conditional requirements prior to the County's issuance of the permit. The applicant may appeal this decision per Section 9, or request a procedural variance.

B. Procedural Variance (Major Deviation Review)

In response to a Planning Director's decision to approve with conditions or deny a permit or administrative variance, the applicant may request a procedural variance from the provisions of the ordinance. A variance review fee, if any, shall be established by ordinance adopted by the Board of Madison County Commissioners. The request will be presented to the Streamside Protection Permit Review Board for recommendation to the Board of Commissioners. Procedural variance applications shall be submitted, reviewed, and acted upon as follows:

1. A procedural variance application may be made within thirty (30) days of the date of the written notice of the Planning Director's decision. The application shall include; the original permit application, including the findings of any required independent professional review; the notice of conditional approval or denial; a management plan prepared in accordance with Exhibit D; and a

narrative addressing the three review criteria established by the Montana Supreme Court for the granting of variances:

- a. The variance would not be contrary to public interest.
 - b. Literal enforcement of the ordinance would result in an unnecessary hardship owing to conditions unique to the property.
 - c. The spirit of the ordinance would be observed and substantial justice done.
2. Upon receipt of fifteen (15) copies of the complete application and applicable review fee, the Planning Director shall schedule a hearing before the Review Board at the next available meeting. A legal notice of the hearing will be placed in the newspaper of general circulation in the county. Said notice must appear not less than 15 days prior to the public hearing and run two consecutive weeks. The applicant shall post a notice of the proposed variance request and the public hearing at one or more conspicuous places on the boundaries of the building site.
3. The Planning Director shall distribute copies of the application to the Review Board and the County Sanitarian and County Floodplain Administrator.
4. The applicant shall allow county representatives and other affected local, state, and federal agency officials access to the site while reviewing the proposed variance application. These onsite visits may be subject to the Montana Open Meeting Law (2-3-201, MCA).
5. One week prior to the public hearing, the Planning Director shall prepare a "Written Findings of Fact" based on the application information, agency input, and three variance review criteria and distribute it to the applicant and the Review Board members.
6. At the public hearing, the Review Board will accept testimony from persons interested in the variance, the applicant and/or their attorney, and the Planning Director. The Review Board shall review the variance application based on the three review criteria established by the Montana Supreme Court for the granting of variances and the Special Conditions criteria specified in Section 8. The Review Board shall consider any mitigation measures proposed by the applicant in the management plan.
7. The Review Board may consult with pertinent local, county, state, and federal agencies during its review of the variance application. If the initial permitting process did not include an independent professional review, such review may be required. When such review is required, the applicant shall be required to pay all independent professional review fees.
8. If the Review Board determines that additional information, vital to a complete and thorough review of the variance, is needed, the review process will halt, to restart at Step B.1 upon submittal of the requested information.

9. Following testimony and Review Board discussion, the Review Board will issue an advisory recommendation of approval, conditional approval, or denial of the variance.
10. Written notice of the Review Board's recommendation and the basis for the decision shall be forwarded to the Board of Madison County Commissioners within ten (10) days and a copy mailed to the applicant by the county planning staff.
11. Upon receipt of the written recommendation, the Board of Commissioners will schedule and post a public meeting for the earliest possible date to act on the variance.
12. Following review and discussion of the recommendation, the Board of Commissioners will by motion vote to approve, conditionally approve, or deny the variance.
13. Written notice of the decision shall be mailed to the applicant by the Planning Director. If the variance is denied, or conditionally approved, the notice shall include an explanation of the basis for the denial, or conditions. The applicant may appeal this decision to a court of record per Section 9. Appeal Process.

Section 11. Exceptions

Setbacks pertain to all building construction or alteration activities unless specifically allowed by exception under this section. A site inspection by the County Planning Director may be required to determine eligibility for the following exceptions:

- a. A pre-existing building may rebuild and/or expand, provided:
 1. New construction shall not be any closer to a regulated stream than the pre-existing building.
 2. A pre-existing building that has been destroyed may be rebuilt and expanded at the same location. If the building is expanded, it shall not be located any closer to a regulated stream than the pre-existing building.
- b. Building sites fronting on ephemeral streams
- c. Building sites where setback boundaries and/or building envelopes were established and approved by prior subdivision review processes, including variances.
- d. Landscaping, fencing, road building, or grading activities.
- e. Irrigation structures and buildings

Section 12. Enforcement

In the event a suspected violation of this ordinance is reported to the County Planning Office, the applicant will be contacted by the County Planning Director to schedule a compliance inspection. If a violation is confirmed, the permit may be revoked or amended, and penalties assessed according to Section 13. Penalties.

Section 13. Penalties

Any person, firm, or corporation that violates the provisions of this Ordinance shall be guilty of a misdemeanor and punishable by a fine of up to \$500 and/or a jail term of not greater than six months, or other maximum as defined by law. Criminal responsibilities of firms or corporations shall be governed by relevant provisions of 45-2-311 and 45-2-312, MCA.

Section 14. Severability

If any part or portions of this Ordinance shall be declared invalid or unenforceable for any reason by a court of competent jurisdiction, the remainder shall nonetheless continue in effect.

These standards shall be construed to be consistent with any federal or state regulations which pre-empt or take precedence over the standards herein. In the event that either the federal or state government adopt standards more stringent than those described herein, the more stringent standards shall apply.

PASSED BY THE BOARD OF MADISON COUNTY COMMISSIONERS and
signed after the First Reading, this ____ day of _____, 2009.

This Ordinance shall take effect as of _____.

PASSED BY THE BOARD OF MADISON COUNTY COMMISSIONERS and
signed after the Second Reading, this ____ day of _____, 2009.

Madison County Clerk & Recorder

[SEAL]

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EXHIBIT A.

PLANNING AREA MAP

Under construction

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EXHIBIT B

LIST OF REGULATED STREAMS

Under construction

Alphabetical list of regulated streams with the planning area categorized by general size, location and type.

General Size

Small

Medium

Large

Location

First Order

Second Order

Third Order

Type

Perennial

Intermittent

Ephemeral

EXHIBIT C

CRITERIA USED TO DETERMINE ENVIRONMENTAL SIGNIFICANCE OF IMPACTED PROPERTY

Under construction

Significant riparian habitat and water quality-related environmental characteristics of the property

Note: Several sources of scientific data have been relied upon to compile a field manual identifying significant vegetation types and conditions associated with critical wildlife habitat and protection of water quality. Where available, this information will be specific and unique to the planning area based on documented field conditions.

Current Conditions

Type and number of streams
Type of vegetation present
Condition of vegetation
Soil Conditions
Depth to groundwater
Natural drainage patterns
Wildlife value
Wetlands

Enhancement Opportunities

Revegetation of damaged habitat
Address drainage (run-off) problems

Other agencies comments and recommendations

EXHIBIT D

MANAGEMENT PLAN

Under Construction

If construction will unavoidably impact important environmental resources, as defined in Exhibit C, the management plan must describe efforts to minimize disturbance and reclaim damaged areas. The management plan will incorporate the Montana DEQ's Best Management Practices (BMPs) for Stormwater Control and the recommendations of the Madison Conservation District Manager and local Montana FWP representatives.

Materials required:

Site photos

Topographical map at a scale that accurately represents ground features (scale?)

Scaled sketch plan of the property indicating location of:

1. Building footprint
2. Outbuildings
3. Building Envelope, if applicable
4. Access roads
5. Septic system with drain field
6. Well
7. Primary vegetation areas
8. Streams, with OHM
9. Wetlands
10. Natural drainages
11. Steep slope areas, more than 25% grade

Project Narrative describing the following:

Proposed building activity

1. Size of the building (sq. ft.)
2. Type of foundation
3. Construction materials

Property and building site

1. Size of parcel (acres, sq. ft.)
2. General shape of the parcel
3. Average grade
4. General orientation of streams, access roads, natural drainages, major vegetation area, wetlands relative to the building site

5. Width of streams
6. Condition of stream banks
7. Type of streams (perennial, intermittent, ephemeral)

Potential Negative impacts

Potential positive impacts

Mitigation options

BMPs

Revegetation plan

Conservation areas, besides setback zones

Enhancement opportunities

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APPENDIX A

Streamside Protection Permit Application

Under Construction

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